

UNITED STATES TAX COURT
WASHINGTON, DC 20217

JOSEPH A. INSINGA,)
)
Petitioner,)
)
v.) Docket No. 4609-12W.
)
COMMISSIONER OF INTERNAL REVENUE,)
)
Respondent)

ORDER

On March 25, 2013, petitioner filed a document entitled “Withdrawal of Rule 81 Application; Motion to Take the Discovery Deposition of Whistleblower Office Program Manager Robert B. Gardner; Motion to Serve Requests for Production of Documents”, which the Court filed as a motion for leave to withdraw petitioner’s Rule 81 application. To the extent the motion requests leave to withdraw the Rule 81 application, it will be granted; but to the extent petitioner’s filing requests leave to take a discovery deposition and to serve formal discovery requests, it will be denied for three reasons:

First, under Rule 54(b), “Unless otherwise permitted by the Court, motions shall be separately stated and not joined together” (with exceptions not applicable here).

Second, and more important, petitioner’s discovery-related motions are premature. Rule 70(a) provides, “the Court expects the parties to attempt to attain the objectives of discovery through informal consultation or communication before utilizing the discovery procedures provided in these Rules.” (Emphasis added.) See also Branerton Corp. v. Commissioner, 61 T.C. 691 (1974). Petitioner’s motions make no allegation of any prior attempt at informal consultation but rather appear to indicate that the motions are Petitioner’s initial attempts. The Court instructs respondent to treat petitioner’s application filed March 18, 2013, and petitioner’s motion for leave filed March 25, 2013, as informal requests for

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information and to respond with reasonable promptness. Treated as informal requests, these documents may be an adequate informal predicate for later formal document requests or interrogatories. But until the informal process has been attempted, we cannot tell whether any formal discovery must be attempted or compelled. (Petitioner should also note that Rule 74(c) requires first the service (not the filing) of a notice and an objection, and only then the filing of a motion for an order compelling the deposition.)

Third, insofar as petitioner's motion requests leave to take a discovery deposition, it overlooks other important provisions in our rules. Rule 70(a) (quoted above) goes on to state: "Discovery is not available under these Rules through depositions except to the limited extent provided in Rule 74"; and as to depositions to be taken without the consent of the other party, Rule 74(c)(1)(B) provides:

The taking of a deposition of . . . a nonparty witness . . . under this paragraph is an extraordinary method of discovery and may be used only where . . . a nonparty witness . . . can give testimony . . . which [is] discoverable within the meaning of Rule 70(b) and where such testimony . . . cannot be obtained through informal consultation or communication (Rule 70(a)(1)), [or through] interrogatories (Rule 71)

Where, as here, the proposed non-party witness is an employee of one of the parties, petitioner may well be able to obtain information through these other means; and in a telephone conference among the Court and the parties on March 25, 2013, respondent agreed to consider whether it could consent to petitioner's counsel having an informal interview with Mr. Gardner. But even where the information is difficult to obtain by such informal means, the non-consented deposition remains an "extraordinary method of discovery" that the Court is unlikely to permit in the routine case.

However, where a party is effectively barred by these rules from taking the deposition of an opposing party's employee who will testify at a hearing, he should be able to use interrogatories to obtain from the opposing party the information known to the other party's employee. And if the opposing party were unreasonable in making its responses to reasonable interrogatories, or if at a hearing the requesting party were surprised by testimony giving information that should have been disclosed in the opposing party's interrogatory responses, the Court would entertain a motion for sanctions under Rule 104(c). In addition, the

Court's order of March 27, 2013, requires each party to include in its Pre-Hearing Memorandum, to be filed a month before the hearing--

an identification of each witness to be called at the hearing, with a detailed summary of his anticipated testimony on jurisdictional issues. The Court would not expect to allow a party to call a witness who had not been so identified nor to elicit testimony that had not been fairly so summarized, without a showing of good cause.

The Court is therefore optimistic that petitioner may ultimately conclude he does not need a deposition of Mr. Gardner. But in any event, that remains to be seen, and a motion under Rule 74(c)(2)(B) is not now timely.

It is therefore

ORDERED that petitioner's motion for leave filed March 25, 2013, is granted to the extent that it requests leave to withdraw petitioner's Rule 81 application filed March 18, 2013, and that application is hereby deemed withdrawn; but it is further

ORDERED that petitioner's motion for leave is otherwise denied without prejudice--i.e., insofar as it requests leave to take a deposition and to serve formal discovery requests.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
March 29, 2013